

In Defense of Race Proportionality

BARBARA J. FLAGG*

The future of our Nation rests on the quality of the education its young people receive. And for our Negro children quality education is especially vital because it is the key to equality.

.....

Although we have made substantial progress in ending formal segregation of schools, racial isolation in the schools persists—both in the North and the South—because of housing patterns, school districting, economic stratification and population movements. It has become apparent that such isolation presents serious barriers to quality education. The problems are more subtle and complex than those presented by segregation imposed by law. The remedies may be difficult.¹

INTRODUCTION

In *Parents Involved in Community Schools v. Seattle School District No. 1*,² the Supreme Court held that public school districts may not, consistent with the Fourteenth Amendment's Equal Protection Clause, employ race-specific measures when seeking to achieve district-wide racial integration.³ Seattle, Washington and Jefferson County, Kentucky, the two school districts involved in the litigation consolidated in the Supreme Court, each had adopted procedures for student assignment that looked to the racial composition of their district-wide student populations, and had attempted to reproduce that distribution, more or less, in each school within the district.⁴ Applying strict scrutiny, a plurality of Justices, in an opinion authored by Chief Justice Roberts, took the position that none of the purposes proffered

* Professor of Law and John S. Lehmann Research Professor, Washington University School of Law. I thank Susan Appleton, Faye Fay, Kathy Goldwasser, Steve Gunn, and Terry Smith for helpful comments on earlier drafts of this Essay.

¹ Letter Requesting a Study of Racial Isolation as a Barrier to Quality in Education, 615 PUB. PAPERS 1116, 1116–17 (Nov. 17, 1965) (letter from President Lyndon B. Johnson to John A. Hannah, Chair, U.S. Commission on Civil Rights) [hereinafter Johnson Letter]. In response to the letter, the Commission produced a Report on Racial Isolation. U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967) [hereinafter REPORT].

² *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

³ *Id.* at 2768.

⁴ *Id.* at 2746. In each district a fairly wide deviation from the demographic baseline was permitted. *Id.* at 2747 n.3 (10–15% either way in Seattle); *id.* at 2749 (15–50% black enrollment permitted in Jefferson County, where overall student population was 34% black).

by the two defendant districts met the constitutional requirement that a state interest be “compelling,”⁵ and in addition expressed the view that the race-specific means adopted were not “necessary” to achieve the asserted objectives.⁶ The plurality was joined in the holding by Justice Kennedy, who wrote separately to explain that in his judgment districts seeking to achieve racial balance among schools might in some cases be permitted to employ race-conscious but not race-specific means of advancing that goal.⁷

Much of the discussion in each of the Court’s various opinions focuses on the districts’ interest in promoting racial diversity in the school classroom, an understandable locus of attention given that an interest in student body diversity at the university level had been found to be a “compelling” purpose in *Grutter v. Bollinger*, in 2003.⁸ However, this Essay will look instead at two interests asserted by Seattle before the Supreme Court that are distinct from the diversity interest but which did not garner much comment from the Court.⁹ These are interests in avoiding “racial isolation” and in providing “equitable access” to all of Seattle’s high schools for all students within the district. These state objectives, especially the goal of avoiding “racial isolation,” have been part of the education policy conversation since the 1960s, and continue to deserve attention today, the holding in *Parents Involved* notwithstanding. Before proceeding, however, some clarification of this project’s parameters is in order.

First, I do not approach this topic primarily as an issue of constitutional law. Instead, I’ll examine the question of race proportionality—achieved through race-specific means—in the first instance as a matter of policy, and then turn only briefly to a discussion of the constitutional question. I take this approach—elevating policy above the constitutional issue—not because I think policy considerations do or should drive constitutional analysis, but because I, like the four dissenting Justices in *Parents Involved*, interpret the Equal Protection guarantee differently than does the Court’s majority in that case.¹⁰ There is, I believe, a viable understanding of Equal Protection that

⁵ *Id.* at 2752. Justice Kennedy joined the plurality in this portion of the opinion.

⁶ *Id.* at 2756.

⁷ *Id.* at 2792 (Kennedy, J., concurring).

⁸ *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

⁹ I focus on Seattle alone because, as stated in the text, that district employed the term “racial isolation”; Jefferson County used a less precise term, asserting an interest in educating students in a “racially integrated environment.” *Parents Involved*, 127 S. Ct. at 2755 (plurality opinion) (quoting Joint Appendix at 22, *Meredith v. Jefferson County Bd. of Educ.*, 548 U.S. 938 (No. 05-915)).

¹⁰ That is, I interpret it to embody an anti-subordinationist norm, unlike the plurality and Justice Kennedy, who see in it a colorblindness principle.

renders race proportionality permissible, and thus the policy question is not foreclosed, as it might appear under the holding of *Parents Involved*. Still, that which is constitutionally permissible is not necessarily good policy, and the latter is the subject of this Essay.

Second, I do not consider the demands of equal educational opportunity as they apply across school districts, even though that may be the arena in which the problem is greatest and the need for reform most pressing.¹¹ I focus instead on the issue of equity within school districts, because that is the setting in which the *Parents Involved* case—the subject of this Symposium—arose, and because it represents an aspect of the problem that receives relatively little attention. Racial isolation and attendant resource inequities remain pressing issues at the intradistrict level. As one commentator puts it: “Something systemic about a school serving predominantly Black, or predominantly White, students—covering both resources and expectations—contributes to the success or failure of all students who attend.”¹² Thus this Essay examines race proportionality within, rather than between, school districts, considering the racial distribution of students at the school level.

Many commentators caution that integrating schools does not necessarily solve, or even address, the problem of racially equitable educational opportunities; inequalities along racial lines can and often do exist *within* individual schools as well.¹³ Indeed, Seattle’s own Garfield High is a case in point. One of the oversubscribed Seattle high schools to which the challenged race-specific student assignment procedure was applied, Garfield is the only such school located in a predominantly black neighborhood; students assigned to Garfield under the race-specific criterion were white.¹⁴ However, the desirable racial diversity seen at the school level (approximately 46% white, 30% black, 17% Asian, 6% Latino, and 2% Native American in 2004¹⁵) did not translate into integration at the classroom

¹¹ See, e.g., JONATHAN KOZOL, *SAVAGE INEQUALITIES* (1991).

¹² Carol Ascher, *The Changing Face of Racial Isolation and Desegregation in Urban Schools*, NEW SCHOOLS, NEW COMMUNITIES, Winter 1995, at 42, 45.

¹³ See, e.g., Dylan Conger, *New Directions in Measuring Racial Isolation in School* 5–7 (N.Y.U. Inst. for Educ. & Soc. Pol’y Working Paper Series, Working Paper No. 08-02, 2008), available at <http://steinhardt.nyu.edu/scmsAdmin/uploads/001/113/wp08-02webversion.pdf>; Charles T. Clotfelter, Helen F. Ladd & Jacob L. Vigdor, *Segregation and Resegregation in North Carolina’s Public School Classrooms*, 81 N.C. L. REV. 1463, 1466–67 (2003); REPORT, *supra* note 1, at 161–62.

¹⁴ *Parents Involved*, 127 S. Ct. at 2748.

¹⁵ Gregory Roberts, *The Two Garfields: The Racial Achievement Gap at a Premier School*, SEATTLE POST-INTELLIGENCER, June 7, 2004, at A1, available at http://seattlepi.nwsourc.com/local/176577_garfield07.html.

level or to educational equity. Of the 630 Advanced Placement students at Garfield in 2004, 64% were white, 22% Asian, and only 8% black.¹⁶ Thus, “[i]n the remedial class, all but one of the students [were] black; in the honors class, white students fill[ed] the seats, along with a handful of Asian students.”¹⁷ “The ‘two Garfields’: It’s a term recognized widely, if reluctantly, by teachers, administrators, students and parents throughout Seattle Public Schools”¹⁸

Clearly, race proportionality implemented only at the school level is not a panacea. Even so, I think it a good place to begin. Race proportionality among schools would constitute some progress relative to the racially skewed educational opportunities that currently are available in many large urban districts. Moreover, the dynamics of pupil assignment within schools undoubtedly would be different in a racially proportionate system than would be the case in ones with racially identifiable schools, with or without the modest amelioration sometimes provided by magnet schools such as Garfield. We don’t yet have the experience with such systems to be able to reason competently regarding classroom assignment policies that might make sense in a genuinely race proportional district. The present discussion should be taken as a first cut in the direction of formulating racially equitable education policy.

A final preliminary comment: there is good reason to be concerned that inequality of educational opportunity is both a result and a cause of racial hierarchy in the United States, especially as regards blacks and whites. Many studies show that black children underperform white children on standardized tests even before entering school, and that the gap between the two groups grows through the school years.¹⁹ However, there is recent evidence that: a) the black-white test gap has “generally been declining over time”;²⁰ b) the preschool gap disappears if one takes into account a relatively small number of other variables;²¹ and c) the “leading explanation for the worse trajectory of black students in our sample is that they attend lower-quality schools.”²² The stereotype that blacks are intellectually inferior to

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Roland G. Fryer Jr. & Steven D. Levitt, *Understanding the Black-White Test Score Gap in the First Two Years of School*, 86 REV. ECON. & STAT. 447, 461 (2004).

²⁰ *Id.* at 448.

²¹ *Id.* at 447. These are “children’s age, child’s birth weight, a socioeconomic status measure, WIC participation, mother’s age at first birth, and number of children’s book in the home,” most if not all of which are proxies for poverty. *Id.*

²² *Id.* at 448.

whites traces directly back to the era of slavery, where it was one significant element of the discourse that permitted a country committed to the principle that “all men are created equal” simultaneously to hold other human beings as “property.” Putting that past entirely behind us will require, among other things, putting to rest the notion that blacks are inferior to whites. In turn, it appears that providing genuinely equal educational opportunities to black children is a necessary, and likely sufficient, means of dismantling the myth of black intellectual inferiority; it thus is an indispensable ingredient in the fight for racial justice.

Part I of this Essay describes the treatment of race proportionality in the various opinions issued by the Supreme Court in the *Parents Involved* case. Part II then elaborates Seattle’s asserted interests in avoiding racial isolation and in providing equitable access, the interests which receive short shrift in the Justices’ analyses. Part III assesses race proportionality as policy, considering the costs of maintaining racially identifiable schools and the costs of race proportionality achieved through race-specific means, and then balancing the two sets of harms. The gist of the analysis is that one ultimately must ask whether it is worse to identify all students by race for the purpose of pupil assignment, or to deny some students—predominantly nonwhite and poor—equal educational resources; I think that question answers itself. Finally, Part IV briefly describes leading interpretations of the Fourteenth Amendment, with the limited goal of showing that there is at least one available and plausible interpretation of the Equal Protection Clause that would permit school districts to pursue race proportionality in race-specific ways in the interest of educational equity. I conclude that race proportionality is a strategy that ought not to be dismissed out of hand, even given the outcome in *Parents Involved*.

I. RACE PROPORTIONALITY IN *PARENTS INVOLVED*

During the last year in which the race-conscious aspect of Seattle’s pupil assignment plan was in use,²³ there were ten public high schools in that district.²⁴ Under the challenged plan, incoming ninth grade students were permitted to apply to attend any high school in the system, and also could rank order any number of additional preferences.²⁵ Because some schools inevitably would be oversubscribed under this procedure, Seattle used a set of “tiebreakers” to select those students who would be assigned to attend the

²³ This was the 2001–2002 school year. See Brief for Respondents at 10, *Parents Involved*, 127 S. Ct. 2738 (2007) (No. 05-908) [hereinafter Seattle Brief].

²⁴ See *Parents Involved*, 127 S. Ct. at 2746.

²⁵ *Id.* at 2747.

overly popular schools.²⁶ The first selection criterion identified those applicants who had a sibling already attending the school in question.²⁷ Second, the district looked to questions of racial balance. Taking the overall district demographic as the baseline, ninth graders were selected at this stage on the basis of race. Students whose attendance would help keep the racial composition of the given school within fifteen percentage points,²⁸ in either direction, of the overall racial composition of the district would be admitted; those whose race would have the opposite effect would not be. Finally, if the school were still oversubscribed, a geographic tiebreaker was employed.²⁹

In the U.S. Supreme Court litigation, Seattle identifies three objectives driving its use of race in making student assignments:

(1) to promote the educational benefits of diverse school enrollments; (2) to reduce the potentially harmful effects of racial isolation by allowing students the opportunity to opt out of racially isolated schools; and (3) to make sure that racially segregated housing patterns did not prevent non-white students from having equitable access to the most popular oversubscribed schools.³⁰

The first of these interests is very closely related to the diversity interest articulated and approved by the Court in *Grutter*.³¹ The second and third of Seattle's asserted interests, however, are distinct from the interest in racial diversity. While the diversity interest focuses on the benefits that flow from attending school alongside persons of different races than oneself, the racial isolation and equitable access concerns rest, at least *sub silentio*, on the insight that racial identifiability of schools itself may impact educational opportunity.

Reducing "racial isolation" really means, as the brief itself makes clear when read as a whole, reducing *minority* racial isolation. Seattle's brief does not provide much direct elaboration of the potential harms associated with such isolation, though it does in a footnote refer to "lower high school and

²⁶ *Id.*

²⁷ *Id.*

²⁸ In the text of the opinion the plurality seems to say that it was ten percent, but the point is clarified in a footnote. *Parents Involved*, 127 S. Ct. at 2747 & n.3; see also Seattle Brief, *supra* note 23, at 10.

²⁹ *Parents Involved*, 127 S. Ct. at 2747. Students residing nearest the school in question received this preference. *Id.*

³⁰ Seattle Brief, *supra* note 23, at 19.

³¹ *Grutter*, 539 U.S. at 328.

college completion rates and lower levels of academic achievement.”³² To some extent, the district’s brief equates racial isolation with segregation, and thus attempts to set forth integration per se as the asserted objective. However, a U.S. Commission on Civil Rights Report cited by Seattle develops the issues associated with “racial isolation” more fully;³³ its Findings are summarized in Part II of this Essay and reproduced verbatim in the Appendix.

Seattle’s third articulated purpose is “Providing All Students with Equitable Access to their Schools of Choice.”³⁴ As the district’s brief explains: “Because the majority of Seattle’s over-subscribed high schools are located in predominantly white areas, the Board concluded that a high school assignment plan that relied only on geography and parental choice would disproportionately exclude non-white students from their schools of choice.”³⁵ In the brief, Seattle is careful to describe the oversubscribed schools as “popular,” rather than “better,”³⁶ but there seems to be an underlying concern that these schools are, or at least are perceived to be, superior. This subtext can be discerned in the brief’s choice of the word “equitable,” and in a “slip” at one point later in the argument: describing the state of affairs in 1996, the brief says that along with other considerations, the Board “knew that its constituents continued to place a high value on racial diversity and equality of opportunity to attend quality schools.”³⁷

Thus Seattle comes close to expressing an interest in race proportionality itself, though the district’s brief also overtly disavows any interest in “racial balancing” per se.³⁸ Indeed, the interests in avoiding racial isolation and promoting equitable access both are linked to educational opportunity; neither is pursued precisely in its own right. And, as described above, equality of educational opportunity is distinct from the more familiar interest in racial diversity. Neither point seems to have been fully appreciated by the Supreme Court.

Seattle’s expressed interests in avoiding racial isolation and ensuring equitable access do receive some passing attention in the plurality opinion authored by Chief Justice Roberts. The discussion begins this way:

³² Seattle Brief, *supra* note 23, at 30 n.23.

³³ REPORT, *supra* note 1.

³⁴ Seattle Brief, *supra* note 23, at 33.

³⁵ *Id.*

³⁶ *See, e.g., id.* at 19.

³⁷ *Id.* at 39.

³⁸ *Id.* at 35–37.

In briefing and argument before this Court, Seattle contends that its use of race helps to reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools. . . . Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment, and each contends that because the diversity they seek is racial diversity—not the broader diversity at issue in *Grutter*—it makes sense to promote that interest directly by relying on race alone.³⁹

As this passage indicates, the plurality links Seattle's second and third asserted interests back to the first, the interest in the benefits that flow to individuals from racial diversity, and a lengthy dissection of that interest follows. The crux of this analysis appears to be the fact that "[t]he plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits."⁴⁰ For that reason, the plurality says, the plans are not narrowly tailored in the constitutional sense.⁴¹

Of course, this reading conflates Seattle's second and third asserted interests with the first—the interest in racial diversity in the classroom. It does not appreciate the distinction drawn above between the three interests articulated in Seattle's brief. At the same time, the plurality occasionally alludes to another possible reading: "In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate."⁴² Along the same lines:

This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent. We have many times over reaffirmed that "[r]acial balance is not to be achieved for its own sake."⁴³

At bottom the plurality appears never to comprehend the interests in avoiding racial isolation and in providing equitable access as they had been set forth in Seattle's brief, instead interpreting them as either a reiteration of the standard diversity interest, or as interests in racial balancing per se.

³⁹ *Parents Involved*, 127 S. Ct. at 2755 (plurality opinion).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 2757 (quoting *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from “patently unconstitutional” to a compelling state interest simply by relabeling it “racial diversity.” While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance.⁴⁴

Thus the plurality never really grapples with Seattle’s actual asserted interests in avoiding minority racial isolation and providing equitable access to what otherwise would be “white” schools.

The opinions of neither Justice Stevens nor Justice Thomas have occasion to address, or fail to address, Seattle’s non-diversity interests, as each is concerned with issues other than the asserted state interests. Justice Kennedy does quote all of Seattle’s three articulated interests, but his discussion emphasizes analysis of the state’s means rather than its purposes. He takes the position that “equal educational opportunity” is a permissible state objective: “The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. . . . School districts can seek to reach *Brown*’s objective of equal educational opportunity,”⁴⁵ but offers no consideration of the ways avoiding racial isolation and providing equitable access might foster, or even be necessary to foster, equal educational opportunity. Instead, he focuses on race-conscious as opposed to race-specific means:

If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based

⁴⁴ *Id.* at 2758–59.

⁴⁵ *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring).

on a classification that tells each student he or she is to be defined by race⁴⁶

Finally, the dissent authored by Justice Breyer interprets the school districts' interests as "an interest in promoting or preserving greater racial 'integration' of public schools. By this term, I mean the school districts' interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district's schools and each individual student's public school experience."⁴⁷ Much as these might appear at first glance to be reflective of Seattle's articulated objectives, however, Justice Breyer goes on to explain that:

Regardless of its name, however, the interest at stake possesses three essential elements. First, there is a historical and remedial element: an interest in setting right the consequences of prior conditions of segregation. . . .

Second, there is an educational element: an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools. . . .

. . . .

Third, there is a democratic element: an interest in producing an educational environment that reflects the "pluralistic society" in which our children will live. . . .⁴⁸

Thus Breyer reads the districts' asserted interests as indistinguishable from the remedial and diversity-related interests (having to do with educational and socialization benefits) that have in the past been recognized by the Court as constitutionally "compelling." Seattle's objectives of avoiding racial isolation and providing equitable access are lost in the process.

II. FLESHING OUT SEATTLE'S ASSERTED NON-"DIVERSITY" INTERESTS

In its brief to the Supreme Court, Seattle supports its claim that "racial isolation can cause serious educational harms for students"⁴⁹ with a citation to a 1967 report issued by the U.S. Commission on Civil Rights, titled "Racial Isolation in the Public Schools"⁵⁰ and prepared in response to a

⁴⁶ *Id.* at 2792.

⁴⁷ *Id.* at 2820 (Breyer, J., dissenting).

⁴⁸ *Id.* at 2820–21 (citation omitted).

⁴⁹ Seattle Brief, *supra* note 23, at 30 & n.23.

⁵⁰ REPORT, *supra* note 1.

request made by President Lyndon Johnson in 1965.⁵¹ As stated in the Report's Preface, the Commission studied four issues:

(1) The extent of racial isolation in the public schools and the extent of the disparity in educational achievement between white and Negro school children; (2) the factors that contribute to intensifying and perpetuating school segregation; (3) the relationship between racially isolated education and the outcomes of that education, and the impact of racial isolation on the attitudes and interracial associations of Negroes and whites; and (4) the various programs that have been proposed or put into operation for remedying educational disadvantage and relieving racial isolation in the schools.⁵²

The Report also included a chapter titled "Racial Isolation: The Role of Law,"⁵³ and concluded with a series of recommendations aimed primarily at congressional action.⁵⁴

The Commission's Report is both rich in its discussion and well-supported by then-existing data. I think it valuable for present purposes to reproduce its Findings regarding the four principal areas of study and the "Role of Law" verbatim; they appear in the Appendix to this Essay. The reader may be struck, as was this author, by the degree to which the Findings remain relevant today. A synopsis of the Report's central Findings follows.

The Commission on Civil Rights found that:

Racial isolation in the public schools is intense throughout the United States. . . . Seventy-five percent of the Negro elementary students in the Nation's cities are in schools with enrollments that are nearly all-Negro (90 percent or more Negro), while 83 percent of the white students are in nearly all-white schools. Nearly nine of every 10 Negro elementary students in the cities attend majority-Negro schools.⁵⁵

This degree of racial separation was found to be descriptive of cities across the country, North as well as South, and small as well as large.⁵⁶ Racial isolation was found to be on the rise in the United States, and it was attributed in part to the population movement of whites to the suburbs.

⁵¹ See Johnson Letter, *supra* note 1.

⁵² REPORT, *supra* note 1, at v.

⁵³ *Id.* at 185–192.

⁵⁴ *Id.* at 209–12.

⁵⁵ *Id.* at 199.

⁵⁶ *Id.*

The Report identified several causes of this "intense" racial isolation. These included increasing "racial, social, and economic separation,"⁵⁷ residential segregation, and the "policies and practices of city school systems."⁵⁸ The increasing "racial, social, and economic separation between city and suburb," the Report found, was "attributable in large part to housing policies and practices of both private industry and government at all levels."⁵⁹ Similarly, the Commission found that responsibility for residential segregation within cities was "shared by both the private housing industry and government."⁶⁰ Among the policies and practices of school systems that contribute to racial isolation, the Report mentioned geographical zoning, school attendance areas, and the location and size of schools.⁶¹

With respect to the consequences of racial isolation, the Commission noted that:

There are marked disparities in the outcomes of education for Negro and white Americans. Negro students typically do not achieve as well in school as white students. The longer they are in school the further they fall behind. Negroes are enrolled less often in college than whites and are much more likely to attend high schools which send a relatively small proportion of their graduates to college. Negroes with college education are less likely than similarly educated whites to be employed in white-collar trades. Negroes with college education earn less on the average than high-school educated whites. These disparities result, in part, from factors that influence the achievement, aspirations, and attitudes of school children.⁶²

The Report went on to identify several of these factors:

There is a strong relationship between the achievement and attitudes of a school child and the economic circumstances and educational background of his family. . . . The social class of a student's schoolmates—as measured by the economic circumstances and educational background of their families—also strongly influences his achievement and attitudes. . . . Negro students are much more likely than white students to attend schools in which a majority of the students are disadvantaged. The social class composition of the schools is more important to the achievement and attitudes of Negro students than whites. . . . There are noticeable differences

⁵⁷ *Id.* at 200.

⁵⁸ REPORT, *supra* note 1, at 202.

⁵⁹ *Id.* at 200.

⁶⁰ *Id.* at 201.

⁶¹ *Id.* at 202.

⁶² *Id.* at 202-03.

in the quality of schools which Negroes attend and those which whites attend. . . . The quality of teaching has an important influence on the achievement of students, both advantaged and disadvantaged. Negro students are more likely than white students to have teachers with low verbal achievement, to have substitute teachers, and to have teachers who are dissatisfied with their school assignment.⁶³

Read with these Findings in mind, Seattle's asserted interests in avoiding racial isolation and ensuring equitable access to quality schools take on weight not ascribed to them by the Supreme Court's opinions. One Finding in the "Racial Isolation and the Outcomes of Education" section is particularly apposite:

8. There is also a relationship between the racial composition of schools and the achievement and attitudes of most Negro students, which exists when all other factors are taken into account.

(a) Disadvantaged Negro students in school with a majority of equally disadvantaged white students achieve better than Negro students in school with a majority of equally disadvantaged Negro students.

(b) Differences are even greater when disadvantaged Negro students in school with a majority of disadvantaged Negro students are compared with similarly disadvantaged Negro students in school with a majority of advantaged white students. The difference in achievement for 12th-grade students amounts to more than two entire grade levels.

(c) Negroes in predominantly Negro schools tend to have lower educational aspirations and more frequently express a sense of inability to influence their futures by their own choices than Negro students with similar backgrounds attending majority-white schools. Their fellow students are less likely to offer academic stimulation.

(d) Predominantly Negro schools generally are regarded by the community as inferior institutions. Negro students in such schools are sensitive to such views and often come to share them. Teachers and administrative staff frequently recognize or share the community's view and communicate it to the students. This stigma affects the achievement and attitudes of Negro students.⁶⁴

Thus the Report unequivocally links *racial* isolation with lowered educational attainment for nonwhite students. It provides a foundation for Seattle's asserted interests in avoiding racial isolation and in providing equitable access to its more desirable schools that goes entirely unexamined by the Supreme Court.

⁶³ *Id.* at 203.

⁶⁴ REPORT, *supra* note 1, at 204.

III. RACE PROPORTIONALITY AS POLICY

The Commission on Civil Rights Report on Racial Isolation was prepared not long after the end of legalized segregation in the United States. One might wonder, then, whether racial isolation still exists today, more than forty years later. The data indicate that it does persist, and that in fact it is on the increase after a period of decline.⁶⁵ Even so, "racial isolation" (often defined as a circumstance in which all or most minority students attend schools that are ninety percent or more minority) and "race proportionality" are rather stark contraries. Surely there is an intermediate condition, one in which all or some of the schools within a large school district do not mirror the composition of the district as a whole, but at the same time are not so racially disproportionate as to bring to mind the term "racial isolation." I'll call these schools "racially identifiable," and define that term functionally: when the racial composition of a school's student body is distinctive enough, relative to the larger community, that community members think of it in racial terms (consciously or unconsciously), that school is "racially identifiable." In this taxonomy, "racially identifiable schools" and "race proportionality" become functional opposites, "race proportionality" referring to a situation in which each school within a district approximates the racial make-up of the district as a whole closely enough that schools are not thought of in racial terms.

Unlike "racial isolation," which generally refers to the isolation of nonwhite students, "racial identifiability" is not limited to schools with disproportionately large black, Hispanic, Asian, or other nonwhite student populations; a school might also be identified as "white." Indeed, it is crucial to keep whiteness in the foreground of the analysis when considering racial identifiability, because it may be that whiteness is more determinative of educational opportunity effects than are other racial classifications. That is, the perception that a given school is "white" may have greater impact on educational opportunity in a particular school district than the perception that other schools are "black" or otherwise nonwhite.

The issue to be explored in this Part is whether a policy of race proportionality is justified as a means of avoiding the harms associated with systems of racially identifiable schools. In making this assessment, I focus

⁶⁵ See, e.g., Clotfelter et al., *supra* note 13 and sources cited therein; see also Conger, *supra* note 13, at 12; Fryer & Levitt, *supra* note 19, at 456, 457 tbl. 7; Pedro Noguera, *Racial Isolation, Poverty and the Limits of Local Control as a Means for Holding Public Schools Accountable*, UCLA'S INSTITUTE FOR DEMOCRACY, EDUCATION, & ACCESS 17 (Oct. 2002), available at <http://repositories.cdlib.org/idea/www/www-rr011-1002>.

not on the bottom line achievement outcomes for students in racially identified and racially proportionate schools, but on an intermediate set of conditions having to do with the allocation of educational resources. The linkage between race and the opportunities provided by public schools is fairly clear; whatever one might conclude in the long run about differential achievement rates for different racial groups, surely inequality of opportunity is a problem in itself.⁶⁶ I proceed by considering first the educational opportunity costs of racially identifiable schools, and then turn to a review of the costs imposed when decisionmakers take students' race into account in order to achieve race proportionality. I conclude this Part by arguing that the former—the costs of racial identifiability—are much greater than the latter—the costs of race proportionality achieved via race-specific means.

A. *The Costs of Racial Identifiability*

Operating a system of racially identifiable schools can impose educational opportunity costs on the nonwhite students in that school system.⁶⁷ These costs are associated primarily with resource allocation and include the unequal distribution of both tangible and intangible resources. Secondly, as a corollary to resource inequalities, there can be costs of a social psychological nature. Each of these categories of harms will be described in greater detail below. However, one might first wonder what factors make it plausible to imagine that unequal allocations of resources might be found *within* school districts, especially given today's atmosphere of racial concern and sensitivity.⁶⁸ I suggest that there are at least four avenues by which inequities in educational opportunity might be introduced into a school system.

First, there is the discretion exercised by those responsible for running a large school district. We know that race affects decisionmaking in a great variety of ways, and we know that this is so even when the decisionmaker harbors no racial animus. The mechanisms that account for racial bias on the part of "innocent" decisionmakers include stereotyping, selective perception

⁶⁶ There also is a link between resources and achievement outcomes, but other factors operate as well. See Fryer & Levitt, *supra* note 19, at 457, 461. In the Supreme Court litigation there was conflicting evidence about the connection between racial integration and achievement outcomes. *Parents Involved*, 127 S. Ct. at 2755, but there seems to have been no consideration there of the intermediate factor—quality of schools.

⁶⁷ To reiterate, this is not a discussion of the schools' interest in student body diversity. The absence of diversity harms white as well as nonwhite students.

⁶⁸ As mentioned above, interdistrict inequalities associated with inequalities of wealth between districts are well documented. See KOZOL, *supra* note 11; Clotfelter *et al.*, *supra* note 13, at 1464 & n.1 and sources cited therein.

of stereotype-congruent and stereotype-incongruent information, and color stigmatization. (By "color stigmatization" I mean the often unconscious attitude that whites are more important, more valuable persons than are nonwhites.⁶⁹) The 1967 Commission on Civil Rights Report on Racial Isolation identifies discretionary decisionmaking on the part of "school authorities" as one factor contributing to the segregation of schools, for example.⁷⁰ Indeed, every available study of discretionary decisionmaking shows significant race effects; outcomes of such decisionmaking always are worse for nonwhites than for whites.⁷¹

Now consider the vast range of discretionary resource allocation decisions involved in operating a large school system. The resources brought to bear on the schooling of primary and secondary students include what might be called "hardware"—things like the maintenance, repair, and furnishing of existing school buildings, the construction and furnishing of new schools, and the operation and maintenance of school transportation systems; and "software"—everything else, from educational equipment, class size, teacher assignment, and curriculum, to after-school programming. There is at least an element of discretion built into every such decision, and there are thousands of them to be made. We would have to believe that the subtle and unconscious effect race has on all other types of discretionary decisionmaking is somehow suspended when it comes to the operation of public schools. I myself cannot formulate such a belief, and so I'm left with the near-certainty that resource allocation decisions will be impacted by the racial identifiability of schools in any district that is not race proportionate. To put this bluntly, even within a single district, schools understood to be "white" will be found to enjoy greater resource wealth than schools identified as "nonwhite," and especially schools identified as "black," due in part to school administrators' discretion in matters of resource allocation.

A second factor that may affect resource allocation in systems of racially identifiable schools is the proxy: the use by school officials of facially race-neutral criteria to guide policy, even though those criteria are strongly correlated with race. For example, we are likely to find the greatest number and variety of programs for gifted students located in schools whose students achieve the highest scores on standardized tests. (Here I'm hypothesizing a school district that has no large-scale transfer program.) In these cases, the

⁶⁹ For a deeper discussion of "color stigmatization," see BARBARA J. FLAGG, *THE SOULS OF WHITE FOLK* (forthcoming 2009).

⁷⁰ REPORT, *supra* note 1, at 41.

⁷¹ Barbara J. Flagg, "*Was Blind But Now I See*": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 983–84 & nn.105–13 (1993) and sources cited therein.

school with the high-scoring students is one that also is likely to be identified as “white” or “Asian”—because standardized tests favor whites and Asians.⁷² To put it the other way around, the school that is racially identified as “white” also likely has students who achieve standardized test scores higher than those of students attending “black” or “Hispanic” schools; if school administrators select the former school as the location for “gifted” programs because of those test scores, they are in effect allocating resources differentially along racial lines. I do think that school systems often are run by folks who have a good deal of constructive race-consciousness, and that fact may mitigate predictable race effects to some extent. But if race alone does not influence resource allocation, then surely factors such as test scores have the potential to serve as its proxy.

Third, even within districts that make sincere attempts to allocate resources equitably, there often is too little money to accomplish all that the authorities would consider ideal; compromises and trade-offs must be made. Again going back to the 1967 Commission on Civil Rights Report, studies show that schools located in poor portions of a district, or which have students who come from poorer backgrounds, are likely to find themselves coming out on the short end of resource allocation decisions in part because parents living in poverty are less able than more affluent parents to demand quality education for their children.⁷³ Because of the existing racial distribution of wealth (the poor are disproportionately nonwhite⁷⁴), in a system of racially identifiable schools at least some—if not most—of the “nonwhite” schools will be located in poor neighborhoods or otherwise have a predominantly poor student body. Not only are we likely to find the oldest, least well-maintained, and least well-furnished and equipped school buildings in the poorest parts of a given school district, we are likely to find the least rich curricula and programs there as well. This may be attributed in

⁷² See, e.g., COLLEGE BOARD, SAT PERCENTILE RANKS: CRITICAL READING, MATHEMATICS, AND WRITING PERCENTILE RANKS BY GENDER AND ETHNIC GROUPS (2008), http://professionals.collegeboard.com/profdownload/sat_percentile_ranks_2008_cr_m_w_gender_ethnic_groups.pdf. The SAT data for 2008, show that a score of 650 or better was achieved by 15% of Asians in Critical Reading, 35% of Asians in Math, and 16% of Asians in Writing. *Id.* For whites, 13% achieved scores of 650 or better in Critical Reading, 16% in Math, and 12% in Writing. *Id.* Of blacks who took the SAT, only 2% achieved scores of 650 or better in each of the three subject areas. *Id.* Latinos fared slightly better, with percentages ranging from 3% to 5% for the 650 score among various subgroups. *Id.*

⁷³ REPORT, *supra* note 1, at 78; Noguera, *supra* note 65, at 18.

⁷⁴ See, e.g., BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL EQUALITY (Melvin Oliver & Thomas Shapiro eds., Routledge 2d ed. 2006).

part to the relative inability of poor parents to advocate effectively for their children's educational opportunities.

Finally, and perhaps most significantly, many school districts do not *assign* teachers to specific schools, but instead operate some system of teacher choice or preference, and such a system frequently is based on teacher seniority. Studies show that the most effective teachers tend to be those who are most experienced,⁷⁵ and that better teachers tend to gravitate toward higher-achieving students and schools.⁷⁶ The best teachers might elect to teach at "white" schools out of unconscious racism, or because those schools in fact have students perceived to be "the best and the brightest," or both. But when the best teachers are found in the "white" schools in a racially identifiable system, that constitutes an allocation of educational resources along racial lines.

In sum, maintaining a system of racially identifiable schools opens the door to racially identifiable allocations of educational resources, due to subtle, largely unconscious racism on the part of, and the use of racial proxies by, school district administrators, the relative inability of the (disproportionately nonwhite) poor to defend their children's interests in the struggle for scarce resources, and the independent preference of teachers to be employed at higher achieving and/or "white" schools. It's not necessary to identify the precise cause(s) of inequitable resource allocation, however, to confirm that such racial inequities exist. Studies of that question are uniformly disquieting.

A Brookings Institution paper describes the situation this way:

Even within urban school districts, schools with high concentrations of low-income and minority students receive fewer instructional resources than others. And tracking systems exacerbate these inequalities by segregating many low-income and minority students within schools. In combination, these policies leave minority students with fewer and lower-quality books, curriculum materials, laboratories, and computers; significantly larger class sizes; less qualified and experienced teachers; and less access to high-quality curriculum. Many schools serving low-income and minority students do not even offer the math and science courses needed for college, and they provide lower-quality teaching in the classes they do offer. . . . Over the past 30 years, a large body of research has shown that four factors consistently influence student achievement: all else

⁷⁵ Charles T. Clotfelter, Helen F. Ladd, & Jacob Vigdor, *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 ECON. EDUC. REV. 377, 379 (2005).

⁷⁶ *Id.* at 391; James E. Bruno & Mary-Lynn Doscher, *Contributing to the Harms of Racial Isolation: Analysis of Requests for Teacher Transfers in a Large Urban School District*, EDUC. ADMIN. Q., Spring 1981, at 93.

equal, students perform better if they are educated in smaller schools, where they are well known (300 to 500 students is optimal), have smaller class sizes (especially at the elementary level), receive a challenging curriculum, and have more highly qualified teachers.

Minority students are much less likely than white children to have any of these resources. In predominantly minority schools, which most students of color attend, schools are large (on average, more than twice as large as predominantly white schools and reaching 3,000 students or more in most cities); on average, class sizes are 15 percent larger overall (80 percent for non-special education classes); curriculum offerings and materials are lower in quality; and teachers are much less qualified in terms of levels of education, certification, and training in the fields they teach.⁷⁷

If racial identifiability impacts the flow of resources *into* schools, there is a corollary effect running in the opposite direction: differential resource allocation along racial lines has the potential to reinforce existing racial stereotypes. To whatever extent the “better” schools within a district are racially identified as “white,” white privilege is reinforced ideologically as well as materially. Inequality of educational opportunities sends a message of denigration to and about those students who do not have access to preferred resources; it is a racial message to the extent that schools enjoying different resources are racially identifiable. This secondary, social psychological cost of racial identifiability is itself a significant one.

B. *The Costs of Race Proportionality*

The principal harm imposed by a system of race proportionality arises out of the means by which it is achieved—the overt use of racial designations when making student assignments. Many in today’s culture regard such designations as inherently problematic, and clearly the members of the Supreme Court majority in *Parents Involved* are to be included in that group. The language employed by those Justices sheds some light on the nature of the objection.

Writing for the Court’s plurality in *Parents Involved*, Chief Justice Roberts says:

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that “[a]t the heart of the Constitution’s

⁷⁷ Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, THE BROOKINGS INSTITUTION, Spring 1998, at 2–3, available at http://www.brookings.edu/articles/1998/spring_education_darling-hammond.aspx.

guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class."⁷⁸

The idea here is that the individual is not to be reduced to his or her racial designation, an idea which is expressed somewhat more vividly by Justice Kennedy, writing separately: he uses phrases such as "tells each student he or she is to be defined by race," and "[a]ssigning to each student a personal designation according to a crude system of individual racial classifications. . . ."⁷⁹ Elaborating his view that government permissibly may take race-conscious, but not race-specific action, he says:

If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

....

. . . What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand.⁸⁰

Finally, lest one overlook the underlying normative commitment, Justice Kennedy says: "To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society."⁸¹

These expressions of concern over processes of racial categorization clearly have their roots in our country's history, a history in which the designation "black" cast its bearer as something less than human. This historical allusion might be discerned in Justice Kennedy's use of the phrase "valued and traded" in the final passage quoted above, and it is unmistakable in Justice Thomas' comparisons between the arguments advanced by the Court's dissenters and the "approach . . . advocated by the segregationists in *Brown v. Board of Education*,"⁸² and his admonition that "every time the

⁷⁸ *Parents Involved*, 127 S. Ct. at 2757 (plurality opinion) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

⁷⁹ *Id.* at 2792 (Kennedy, J., concurring).

⁸⁰ *Id.* at 2792, 2797.

⁸¹ *Id.*

⁸² *Id.* at 2768, 2783-86 (Thomas, J., concurring).

government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”⁸³

Against the background of race-based denigration and subordination that people of color generally, and blacks especially, have experienced and continue to experience in this society, it is immediately problematic when any person is given a racial designation and then treated as if that characteristic was the only one that matters. For that reason, the use of racial classifications to achieve a system of race proportionality in a public school system must be treated as a potentially substantial cost of such a regime.

Other harms commonly associated with the employment of racial categories have to do with the potential for divisiveness and with their potential to impede racial progress. Regarding the latter, the argument is that the use of racial classifications would mean that “race will always be relevant in American life, and that the ‘ultimate goal’ of ‘eliminating entirely from governmental decisionmaking such irrelevant factors as a human being’s race’ will never be achieved.”⁸⁴ Of course, the *continued* use of racial classifications is problematic only to the same extent as their use is problematic in the first instance. If the ultimate goal of achieving racial justice is not understood in terms of making race irrelevant, this latter line of reasoning does not identify a *cost* of using racial categories. Even so, both of these ancillary harms will be considered along with the dignitary cost of racial categories deployed in the service of race proportionality.

C. *Striking the Balance*

Of course, the ideal scenario would be one in which a school district imposed neither the harms of unequal educational opportunity nor of race-specific decisionmaking on its students. However, experience has shown that the forces identified above are powerful ones, and in the end resources *do* tend to be distributed differentially along racial lines. In a world in which race continues to affect decisionmaking in deep and intractable ways, is it better policy to disavow the explicit use of racial designations and attempt to grapple with that which lies below the surface, or is it better to meet the problem of racially inequitable resource distribution head on?

This way of framing the question obviously foreshadows the answer—eschewing the overt use of race is of little value if its consequence is only to

⁸³ *Parents Involved*, 127 S. Ct. at 2770 (Thomas, J., concurring) (quoting *Grutter v. Bollinger*, 539 U. S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part)).

⁸⁴ *Id.* at 2758 (plurality opinion) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion)).

reinscribe race in other ways. Sticking entirely to the process/symbolism point for the moment, as noted earlier a racially-aligned allocation of resources has the potential to reinforce racial stereotypes, both of minority students and of whites.⁸⁵ Avoiding this sort of stereotyping is one of the objectives set forth by proponents of the prohibition against overt racial categorization. But once we see that racial stereotypes can be reproduced equally strongly in other ways, that prohibition appears to be little more than a triumph of form over substance.

Turning to the deeper substantive issue, a policy of race proportionality would obviate the harms associated with racially identifiable schools. Pursuing relatively strict race proportionality is the one countermeasure that would address the factors generating resource allocation inequities, such as unconscious racial bias and color stigmatization. Distributing students proportionally throughout a district eliminates any possibility that race will influence the allocation of resources at the school level.⁸⁶ This is not to say that resources automatically would be distributed equally in such a system, as factors other than race might come into play, nor, as noted in the introduction to this Essay, to say that one might not see race effects *within* schools.⁸⁷ But race proportionality would constitute a step forward, and it would resolve the problems of educational opportunity inequities along racial lines that have persisted for the past fifty-plus years, in spite of *Brown*. The lesson of that period is that equality of educational opportunities requires the intertwining of white and nonwhite interests; that is most easily achieved by ensuring that white and nonwhite students attend the same schools.

If race proportionality offers a simple, effective approach to the problem of unconscious racial bias in the allocation of resources within school districts, what about its costs? Can we be justified in considering a "solution" that "demeans us all"?

I said earlier that it is undesirable to be "given a racial designation and then treated as if that characteristic was the only one that matters." That phrasing resonates with the experience of people of color in this society, who too frequently are treated exactly that way. But "race" is not the equivalent of "color," though it frequently is so employed. "White" is a racial category also,⁸⁸ and in a regime of race proportionality it is not only students of color who would bear a racial identification; white students would as well. If

⁸⁵ See *supra* text accompanying notes 77–78.

⁸⁶ It may well eliminate the effects of poverty as well. See *supra* text accompanying notes 73–75.

⁸⁷ See *supra* text accompanying notes 13–18.

⁸⁸ See RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* (1993); Flagg, *supra* note 71.

everyone had such a designation and was assigned to a school on that basis, and if *everyone* therefore attended a school with resources equal to all the others, how great would be the psychic harm inflicted by the racial categorization? Wouldn't the "racial designation" be just a bureaucratic measure necessary to ensure that *everyone* had an opportunity to attend quality schools?

It seems to me that discomfort with "racial designations" stems not only from our history of racial slavery and apartheid, but also from the more recent debates over affirmative action. One image commonly invoked in that context is of the unqualified and therefore undeserving student of color who receives a benefit—a seat in a desirable university, for example—*only* because of his or her race. That image is troublingly incorrect even in the setting of affirmative action, and it is wholly inapposite in the context of race proportionality as school district policy. Here it is not a matter of the "unqualified" being seated alongside their "superiors"; if all are subject to the process of racial identification regardless of ability or merit, one source of potential discomfort with "racial designations" ought to be removed.

This line of argument disposes of the "ancillary harms" mentioned earlier as well.⁸⁹ If in this setting—a scheme of race proportional schools—no real stigma attaches to the process of racial identification, then there is no reason to be concerned over its indefinite continuation.⁹⁰ Similarly, if every student is subject to racial categorization, then there is little cause for concern about "divisiveness."

There remains another, deeper, wellspring of resistance to race proportionality: the erosion of white privilege that would occur in a regime of genuinely equal educational opportunity. One has to wonder why it is that "the U.S. educational system is one of the most unequal in the industrialized world, and students routinely receive dramatically different learning opportunities based on their social status."⁹¹ Surely this culture's emphasis on individualism plays a part—people want, and are encouraged, to hold on to whatever advantages they enjoy. But another factor seems to be a collective one, having to do with white privilege. As bell hooks explains, whites "cannot recognize the ways their actions support and affirm the very structure of racist domination and oppression that they profess to wish to see eradicated."⁹² Insofar as superior access to good public education is one of

⁸⁹ See *supra* text accompanying notes 83–84.

⁹⁰ See *supra* text accompanying notes 84–85.

⁹¹ Darling-Hammond, *supra* note 77.

⁹² BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 113 (1989).

the current facets of white privilege, universally available quality public education would threaten white ascendancy.

Or consider the matter in this way: What would race proportionality mean for the student of color who is familiar with "racial designations," but far too often does not have meaningful access to equal educational opportunity? What would it mean for the white person who is not accustomed to bearing an explicit racial label, but *is* accustomed to having available good public schools?

IV. RACE PROPORTIONALITY AND CONSTITUTIONAL LAW

Because of the widespread patterns of residential housing segregation we see today, and the entrenched expectations of parents regarding school attendance zones and local control, it seems quite unlikely that race proportionality can be achieved by other than race-specific means (contra Justice Kennedy). One might think, then, that race proportionality is a moot issue, given that the Supreme Court has held voluntary race-specific measures in student assignments impermissible. However, the normative interpretation of the Equal Protection Clause upon which that holding rests is neither inevitable nor mandated by history and precedent as Chief Justice Roberts' opinion suggests⁹³—quite the contrary. The "colorblindness" reading of equality adopted in his opinion is historically problematic and quite contestable. As I intend this not to be an essay that emphasizes the constitutional question addressed in *Parents Involved*, I offer here only a brief account of the interpretive issue; the aim is just to demonstrate that consideration of race proportionality as policy is *not* taken off the table by constitutional law.

In Equal Protection jurisprudence the interpretive problem is this: at the time of the framing of the Fourteenth Amendment, race-specific laws existed for the purpose of subordinating (newly freed) blacks. In proposing to the states a federal constitutional provision that proscribed such laws, did the Framers mean to outlaw *race-specific* legislation, or legislation that operated to *subordinate* nonwhites? One can argue that it can't have been the former, because there is evidence that the Framers intended to leave segregated schooling and anti-miscegenation laws untouched.⁹⁴ On the other hand, one can argue that to whatever extent the Framers intended to address legalized subordination, they did not intend to work a wholesale revision of the social

⁹³ See, e.g., *Parents Involved*, 127 S. Ct. at 2751–52, 2757, 2767–68.

⁹⁴ See, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

status relationships between blacks and whites—"equal protection of the laws" was not understood to be a guarantee of across-the-board social equality.⁹⁵ One can duplicate these arguments when reading *Brown v. Board of Education*,⁹⁶ which held segregated schools unconstitutional. Did the Court mean to prohibit the use of any race-specific measures, regardless of their effects (the colorblindness interpretation of Equal Protection), or did it mean to proscribe race-specific laws only insofar as they operate to subordinate blacks (the anti-subordination interpretation)? These questions, in my view, are not resolvable by existing techniques of constitutional interpretation.⁹⁷

The inherent ambiguity just described becomes a problem when we confront race-specific laws that have the effect of ameliorating the subordination of nonwhites, such as race-specific "affirmative action" and race-specific means of accomplishing race proportionality. There is an extensive literature examining and supporting the anti-subordination understanding of the Equal Protection Clause,⁹⁸ and there exists a line of Supreme Court precedent implementing that understanding as well.⁹⁹ (One might add that four sitting Justices share that interpretive view (as is made apparent by the *Parents Involved* opinions themselves), and that that level of disagreement has been apparent in every recent Equal Protection decision

⁹⁵ *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) ("The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.").

⁹⁶ See *Brown v. Bd. Educ.*, 347 U.S. 483 (1954).

⁹⁷ See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

⁹⁸ See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1514-21 (2d ed. 1988); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

⁹⁹ See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation"); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (racial classifications invalidated as "measures designed to maintain White Supremacy"). The Court also has used other doctrinal frameworks to reach anti-subordinationist results in cases presenting underlying Equal Protection issues. See, e.g., *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 487 (1982) (decided on "political process" grounds); *Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967) (decided on state action grounds); *Shelley v. Kraemer*, 334 U.S. 1, 22-23 (1948) (same).

having to do with race.)¹⁰⁰ The fact that colorblindness has held sway for the past fifteen years or so does not render it inevitable or even necessarily respectable. Its most commonly cited foundation, after all, is a statement made by Justice Harlan in dissent, in a passage in which he also quite clearly articulates a white supremacist point of view:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.¹⁰¹

Colorblindness does not aspire to the destruction of racial subordination. As is illustrated in the case of race proportionality, the colorblind approach to equality too often leads directly to the maintenance of white privilege.

CONCLUSION

Race proportionality—the distribution of public school students among schools within a single school district in numbers proportional to the district-wide racial demographic—is one means of avoiding inequalities of resource allocation that otherwise are likely to occur. As a matter of policy, its benefits in providing equal educational opportunity across racial lines clearly outweigh the costs of individual racial identification it imposes on all students, both white and nonwhite. Race proportionality is consistent with an anti-subordinationist interpretation of the Equal Protection Clause, an interpretation at least as persuasive as the colorblindness interpretation adopted by the Supreme Court in recent years. For these reasons race proportionality ought not to be taken off the educational policy table.

¹⁰⁰ That is, the Court has quite consistently handed down 5-4 decisions in recent years. *See, e.g.*, *Gutter v. Bollinger*, 539 U.S. 306 (2003) (race-specific “affirmative action”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (same); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (same); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (same); *Easley v. Cromartie*, 532 U.S. 234 (2001) (race-specific electoral districting); *Bush v. Vera*, 517 U.S. 952 (1996) (same); *Shaw v. Hunt*, 517 U.S. 899 (1996) (same); *Miller v. Johnson*, 515 U.S. 900 (1995) (same); *Shaw v. Reno*, 509 U.S. 630 (1993).

¹⁰¹ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

APPENDIX

**Report on Racial Isolation in the Public Schools
U.S. Commission on Civil Rights¹⁰²****Findings****Racial Isolation: Extent and Context***Extent*

1. Racial isolation in the public schools is intense throughout the United States. In the Nation's metropolitan areas, where two-thirds of both the Negro and white population now live, it is most severe. Seventy-five percent of the Negro elementary students in the Nation's cities are in schools with enrollments that are nearly all-Negro (90 percent or more Negro), while 83 percent of the white students are in nearly all-white schools. Nearly nine of every 10 Negro elementary students in the cities attend majority-Negro schools.

2. This high level of racial separation in city schools exists whether the city is large or small, whether the proportion of Negro enrollment is large or small, and whether the city is located North or South.

Trends

3. Racial isolation in the public schools has been increasing. Over recent years Negro elementary school enrollment in northern city school systems has increased, as have the number and proportion of Negro elementary students in majority-Negro and nearly all-Negro schools. Most of this increase has been absorbed in schools which are now more than 90 percent Negro, and almost the entire increase in schools which are now majority-Negro. There is evidence to suggest that once a school becomes almost half- or majority-Negro, it tends rapidly to become nearly all-Negro.

4. In Southern and border cities, although the proportion of Negroes in all-Negro schools has decreased since the 1954 Supreme Court decision in *Brown v. Board of Education*, a rising Negro enrollment, combined with only slight desegregation, has produced a substantial increase in the number of Negroes attending nearly all-Negro schools.

¹⁰² REPORT, *supra* note 1, at 199-207.

Population Movements in Metropolitan Areas

5. The Nation's metropolitan area populations are growing and are becoming increasingly separated by race. Between 1940 and 1960, the increase of Negroes in metropolitan areas occurred mainly in the central cities while the white increase occurred mainly in the suburbs. These trends are continuing.

6. The trends are reflected among school-age children.

(a) By 1960, four of every five nonwhite school-age children in metropolitan areas lived in central cities while nearly three of every five white children lived in the suburbs.

(b) Negro schoolchildren in metropolitan areas increasingly are attending central city schools and white children, suburban schools.

(c) A substantial number of major cities have elementary school enrollments that are more than half-Negro.

Causes of Racial Isolation

Metropolitan Dimensions

1. The Nation's metropolitan area populations also are becoming increasingly separated socially and economically. There are widening disparities in income and educational level between families in the cities and families in the suburbs. People who live in the suburbs increasingly are more wealthy and better educated than people who live in the cities.

2. The increasing racial, social, and economic separation is reflected in the schools. School districts in metropolitan areas generally do not encompass both central city and suburban residents. Thus, central city and suburban school districts, like the cities and suburbs themselves, enclose separate racial, economic, and social groups.

3. Racial, social, and economic separation between city and suburb is attributable in large part to housing policies and practices of both private industry and government at all levels.

(a) The practices of the private housing industry have been discriminatory and the housing produced in the suburbs generally has been at prices only the relatively affluent can afford.

(b) Local governments in suburban areas share the responsibility for residential segregation. Residential segregation has been established through such means as racially restrictive zoning ordinances, racially restrictive covenants capable of judicial enforcement, administrative determinations on building permits, inspection standards and location of sewer and water facilities, and use of the power of eminent domain, suburban zoning, and land use requirements to keep Negroes from entering all-white communities.

(c) Federal housing policy has contributed to racial segregation in metropolitan areas through past discriminatory practices. Present non-discrimination policies and laws are insufficient to counteract the effects of past policy.

(d) Laws and policies governing low- and moderate-income housing programs, including public housing, the FHA 221 (d) (3) program, and the rent supplement program, serve to confine the poor and the nonwhite to the central city. Under each of these programs, suburban jurisdictions hold a special veto power.

4. Racial and economic isolation between city and suburban school systems is reinforced by disparities of wealth between cities and suburbs and the manner in which schools are financed.

(a) Schools are financed by property tax levies which make education dependent on the wealth of the community.

(b) Suburbs with increasing industry and increasing numbers of affluent people have a large tax base and are able to finance their schools with less effort.

(c) Cities with shrinking industry, a disproportionate share of the poor, and increasing costs for non-educational services to both residents and nonresidents, are less able to provide the required revenue for schools.

(d) State educational aid for schools, though designed to equalize, often does not succeed in closing the gap between city and suburban school districts.

(e) Federal aid at present levels in most instances is insufficient to close the gap between central city school districts and those of more affluent suburbs.

(f) These disparities provide further inducement to many white families to leave the city.

Racial Isolation and the Central City

5. Within cities, as within metropolitan areas, there is a high degree of residential segregation—reflected in the schools—for which responsibility is shared by both the private housing industry and government.

(a) The discriminatory practices of city landlords, lending institutions, and real estate brokers have contributed to the residential confinement of Negroes.

(b) State and local governments have contributed to the pattern of increasing residential segregation through such past discriminatory practices as racial zoning ordinances and racially restrictive covenants capable of judicial enforcement. Current practices in such matters as the location of low-rent public housing projects, and the displacement of large numbers of

low-income nonwhite families through local improvement programs also are intensifying residential segregation.

(c) Federal housing programs and policies serve to intensify racial concentrations in cities. Federal policies governing low- and moderate-income housing programs such as low-rent public housing and FHA 221 (d) (3) do not promote the location of housing outside areas of intense racial concentration. Federal urban renewal policy is insufficiently concerned with the impact of relocation on racial concentrations within cities.

6. Individual choice contributes to the maintenance of residential segregation, although the impact of such choice is difficult to assess since the housing market has been restricted.

7. In all central cities, as compared to their suburbs, nonpublic schools absorb a disproportionately large segment of the white school population; nonwhites, however, whether in city or suburbs, attend public schools almost exclusively.

Educational Policies and Practices

8. The policies and practices of city school systems have a marked impact on the racial composition of schools.

(a) Geographical zoning, the most commonly used form of student assignment in northern cities, has contributed to the creation and maintenance of racially and socially homogeneous schools.

(b) School authorities exercise broad discretion in determining school attendance areas, which in most communities are not prescribed by reference to well-defined neighborhoods or by specific guidelines based on the optimum size of schools.

(c) In determining such discretionary matters as the location and size of schools, and the boundaries of attendance areas, the decisions of school officials may serve either to intensify or reduce racial concentrations. Although there have been only a few instances where purposeful segregation has been judicially determined to exist in the North, apparently neutral decisions by school officials in these areas frequently have had the effect of reinforcing racial separation of students.

(d) In Southern and border cities, similar decisions of school officials, combined with a high degree of residential racial concentration and remnants of legally compelled segregation, have had the effect of perpetuating racial isolation in the schools.

Racial Isolation and the Outcomes of Education

1. There are marked disparities in the outcomes of education for Negro and white Americans. Negro students typically do not achieve as well in

school as white students. The longer they are in school the further they fall behind. Negroes are enrolled less often in college than whites and are much more likely to attend high schools which send a relatively small proportion of their graduates to college. Negroes with college education are less likely than similarly educated whites to be employed in white-collar trades. Negroes with college education earn less on the average than high-school educated whites. These disparities result, in part, from factors that influence the achievement, aspirations, and attitudes of school children.

2. There is a strong relationship between the achievement and attitudes of a school child and the economic circumstances and educational background of his family. Relevant factors that contribute to this relationship include the material deprivation and inadequate health care that children from backgrounds of poverty often experience, the fact that disadvantaged children frequently have less facility in verbal and written communication—the chief vehicle by which schools measure student achievement—and the inability of parents in poor neighborhoods to become as involved in school affairs and affect school policy as much as more affluent parents.

3. The social class of a student's schoolmates—as measured by the economic circumstances and educational background of their families—also strongly influences his achievement and attitudes. Regardless of his own family background, an individual student achieves better in schools where most of his fellow students are from advantaged backgrounds than in schools where most of his fellow students are from disadvantaged backgrounds. The relationship between a student's achievement and the social class composition of his school grows stronger as the student progresses through school.

4. Negro students are much more likely than white students to attend schools in which a majority of the students are disadvantaged. The social class composition of the schools is more important to the achievement and attitudes of Negro students than whites.

5. There are noticeable differences in the quality of schools which Negroes attend and those which whites attend. Negro students are less likely than whites to attend schools that have well-stocked libraries. Negro students also are less likely to attend schools which offer advanced courses in subjects such as science and languages and are more likely to be in overcrowded schools than white students. There is some relationship between such disparities and the achievement of Negro students.

6. The quality of teaching has an important influence on the achievement of students, both advantaged and disadvantaged. Negro students are more likely than white students to have teachers with low verbal achievement, to have substitute teachers, and to have teachers who are dissatisfied with their school assignment.

7. The relationship between the quality of teaching and the achievement of Negro students generally is greater in majority-Negro schools than in majority-white schools. Negro students in majority-white schools with poorer teachers generally achieve better than similar Negro students in majority-Negro schools with better teachers.

8. There is also a relationship between the racial composition of schools and the achievement and attitudes of most Negro students, which exists when all other factors are taken into account.

(a) Disadvantaged Negro students in school with a majority of equally disadvantaged white students achieve better than Negro students in school with a majority of equally disadvantaged Negro students.

(b) Differences are even greater when disadvantaged Negro students in school with a majority of disadvantaged Negro students are compared with similarly disadvantaged Negro students in school with a majority of advantaged white students. The difference in achievement for 12th-grade students amounts to more than two entire grade levels.

(c) Negroes in predominantly Negro schools tend to have lower educational aspirations and more frequently express a sense of inability to influence their futures by their own choices than Negro students with similar backgrounds attending majority-white schools. Their fellow students are less likely to offer academic stimulation.

(d) Predominantly Negro schools generally are regarded by the community as inferior institutions. Negro students in such schools are sensitive to such views and often come to share them. Teachers and administrative staff frequently recognize or share the community's view and communicate it to the students. This stigma affects the achievement and attitudes of Negro students.

9. The effects of racial composition of schools are cumulative. The longer Negro students are in desegregated schools, the better is their academic achievement and their attitudes. Conversely, there is a growing deficit for Negroes who remain in racially isolated schools.

10. Racial isolation in school limits job opportunities for Negroes. In general, Negro adults who attended desegregated schools tend to have higher incomes and more often fill white-collar jobs than Negro adults who went to racially isolated schools.

11. Racial isolation is self-perpetuating. School attendance in racial isolation generates attitudes on the part of both Negroes and whites which tend to alienate them from members of the other race. These attitudes are reflected in behavior. Negroes who attended majority-white schools are more likely to reside in interracial neighborhoods, to have children in majority-white schools, and to have white friends. Similarly, white persons who attended school with Negroes are more likely to live in an interracial

neighborhood, to have children who attend school with Negroes, and to have Negro friends.

Remedy

Compensatory Programs in Isolated Schools

1. Evaluations of programs of compensatory education conducted in schools that are isolated by race and social class suggest that these programs have not had lasting effects in improving the achievement of the students. The evidence indicates that Negro children attending desegregated schools that do not have compensatory education programs perform better than Negro children in racially isolated schools with such programs.

2. Compensatory education programs have been of limited effectiveness because they have attempted to solve problems that stem, in large part, from racial and social class isolation in schools which themselves are isolated by race and social class.

3. Large-scale increases in expenditures for remedial techniques, such as those used in preschool projects funded under the Head Start Program, which improve teaching and permit more attention to the individual needs of children, undoubtedly would be helpful to many students, although it is uncertain that they could overcome the problems of racial and social class isolation.

4. Compensatory education programs on the present scale are unlikely to improve significantly the achievement of Negro students isolated by race and social class.

Desegregation

5. Several small cities and suburban communities have desegregated their schools effectively. Although a variety of techniques have been used in these communities, a major part of each plan has been the enlargement of attendance areas. Desegregation generally has been accepted as successful by these communities.

6. Factors contributing to successful school desegregation include the exercise of strong leadership by State and local officials to help implement desegregation, the involvement of all schools in the community, the desegregation of classes within desegregated schools, steps to avoid the possibility of interracial friction, and the provision of remedial assistance to children who need it. The available evidence suggests that the academic achievement of white students in desegregated classrooms generally does not suffer by comparison with the achievement of such students in all-white classrooms. Steps have been taken in communities that have desegregated

their schools successfully to maintain or improve educational standards. There is also evidence that non-academic benefits accrue to white students who attend desegregated schools.

7. The techniques employed by large city school systems generally have not produced any substantial school desegregation.

(a) Techniques such as open enrollment which do not involve the alteration of attendance areas have not produced significant school desegregation. The effectiveness of open enrollment is limited significantly by the availability of space in majority-white schools and the requirement in many cases that parents initiate transfer requests and pay transportation costs. Open enrollment also does not result in desegregation of majority-Negro schools.

(b) Other techniques which do involve the alteration of attendance areas, such as school pairing, have not been as successful in producing desegregation in large cities as in smaller cities.

8. The large proportion of Negro children in many central city school systems makes effective desegregation possible only with the cooperation of suburban school systems.

9. Programs involving urban-suburban cooperation in the desegregation of schools, while only beginning and presently very limited, show promise as techniques for desegregating the schools in the Nation's larger metropolitan areas.

10. In large cities, promising proposals have been developed which seek to desegregate schools by broadening attendance areas so that school populations will be more representative of the community as a whole and to improve the quality of education by providing additional resources and innovations in the educational program.

(a) Proposals for educational facilities such as supplementary education centers and magnet schools, which contemplate a system of specialized school programs located either in existing schools or in new facilities, and education complexes, which would consist of clusters of existing schools reorganized to provide centralized services for schoolchildren in an enlarged attendance area, would contribute to improving the quality of education and would provide some progress in school desegregation.

(b) Proposals for education parks, designed to improve the quality of education and desegregate the schools by providing new centralized school facilities serving a range of grade levels in a single campus, are most promising. Such parks could contribute to improving the quality of education by permitting advances and innovations in educational techniques not possible in smaller schools and could facilitate desegregation by enlarging attendance areas, in some cases to draw students both from the central city and the suburbs. Although legitimate concerns have been raised about the size and complexity of education parks, the new and flexible approaches to teaching

and learning they would make possible could provide greater individual attention for each child's needs than is now possible in smaller schools. Additional problems relating to the cost and feasibility of education parks can be met in some measure by the economies which are made possible by the consolidation of resources in larger facilities. Although education parks would require a substantial new investment, it is within the range of what is feasible if the costs are shared by the Federal, State, and local governments.

Racial Isolation: The Role of the Law

1. Purposeful school segregation—violative of the Constitution—has occurred in Northern cities.

2. It remains an open question whether school segregation which is not imposed by purposeful action of school authorities violates the Constitution. The Supreme Court of the United States has not resolved the issue.

3. The courts consistently have upheld State or local action to eliminate or alleviate racial isolation in the public schools against the charge that it is unconstitutional to consider race in formulating school board policies. Only a few States have taken any action to require local school authorities to remedy racial isolation in their schools.

4. Congress has passed legislation aimed at eliminating racial discrimination in the assignment of children to public schools, but this legislation does not appear to dictate the application of sanctions not involving purposeful discrimination.

5. Congress has the power to enact legislation to remedy the inequality of educational opportunity to which Negro students are subjected by being assigned to racially isolated schools.

6. Congress, with its ability to appropriate funds, is the branch of Government best able to assure quality education and equal educational opportunity.

